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# Supreme Court of the United States

OCTOBER TERM, 1955

No. 511

SOUTH CAROLINA ELECTRIC AND GAS COMPANY,
A CORPORATION, APPELLANT,

*versus*

SARAH MAE FLEMMING, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

## JURISDICTIONAL STATEMENT

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the Fourth Circuit, entered on July 14, 1955, reversing the judgment of the United States District Court for the Eastern District of South Carolina, entered on February 16, 1955, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

### OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 224 F. (2d) 752. The opinion of the District Court for the Eastern District of South Carolina

is reported at 128 F. Supp. 469. Copies of the opinions appear herein as Appendix A and B, respectively.

## JURISDICTION

This action was brought under Title 28 U. S. Code, Sec. 1343 (3), for damages for violation of the Civil Rights Acts, Title 42 U. S. Code, Sec. 1981 and 1983. The judgment of the District Court was entered on February 16, 1955. Upon appeal the judgment of the Court of Appeals was entered on July 14, 1955. Notice of this appeal was filed in that court on September 15, 1955. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U. S. Code, Section 1254(2) and 2101(c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal in this case; *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66, 75 S. Ct. 166; *Public Service Commission v. Batesville Telephone Co.*, 284 U. S. 6, 52 S. Ct. 1; *Baxter v. Continental Casualty Co.*, 284 U. S. 578, 52 S. Ct. 2.

## QUESTIONS PRESENTED

1. Did the Court of Appeals, by reversing the decision of the District Court, err in holding that Sections 58-1491 through 58-1496, Title 58, Code of Laws of South Carolina, 1952, requiring segregation of white and negro passengers in intrastate transportation, are violative of the Fourteenth Amendment to the Constitution of the United States and therefore invalid?

2. Where intrastate bus driver, acting as a policeman pursuant to state law, segregates white and negro passengers in intrastate transportation, are his acts sufficient to support a claim against the carrier itself for violation of the Civil Rights Acts, Title 42, U. S. Code, Sections 1981 and 1983, upon the theory that such actions are ~~pursuant~~ action taken "under color of law" by the carrier?

3. Where intrastate bus driver, made a special policeman by statute, segregates white and negro passengers in intrastate transportation, pursuant to state law, are his acts as a special policeman imputable to the carrier so as to render it liable therefor under the doctrine of *respondeat superior*?

## STATUTES INVOLVED

Sections 58-1491 through 58-1496 of Title 58, Code of Laws of South Carolina, 1952, are set forth in Appendix C hereto. Sections 1 and 3 of the Civil Rights Act, as amended (R. S. §1977 and 1979; 42 U. S. C. §1981 and 1983); and Section 1343(3) of the Judicial Code and Judiciary Act (28 U. S. C. §1343(3); C. 646 62 Stat. 932), are set forth in Appendix D hereto.

## STATEMENT

This is an action for damages in the sum of $25,000.00 which the plaintiff-appellee, a Negro woman, brought in the United States District Court for the Eastern District of South Carolina, against the defendant-appellant, an intrastate common carrier providing municipal bus service in the City of Columbia, South Carolina. Appellee states in her Complaint that she is entitled to these damages under the provisions of Sections 1981 and 1983, Title 42, U. S. Code (16 Stat. 144 and 17 Stat. 13) (Appendix D) for violation of her civil rights. The violation alleged is that appellant's bus driver enforced against her the segregation statutes of South Carolina, Sections 58-1491 through 58-1496, S. C. Code, 1952 (Appendix C). Jurisdiction of the District Court is claimed under Section 1343 (3), Title 28, U. S. Code (Appendix D).

Appellant filed a motion to dismiss and an answer. The motion to dismiss was upon the grounds (1) that the District Court lacked jurisdiction under Section 1343 (3), Title 28, U. S. Code, there being no diversity of citizenship

and no "state action" in appellant's activities; (2) that the South Carolina segregation statutes are valid and the appellant is not liable under their terms for enforcement thereof; and (3) that the complaint fails to state facts upon which relief can be granted. The District Court held, *Flemming v. S. C. Electric & Gas Co.*, 128 F. Supp. 469, that it was bound by the decision of this Court in *Plessy v. Ferguson*, 163 U. S. 567, and that segregation in intra-state public transportation is a valid exercise of State police power. It granted the motion to dismiss upon the ground that the complaint fails to state a claim upon which relief can be granted. The opinion and order is set forth herein as Appendix A.

The appellee herein appealed from that judgment to the U. S. Court of Appeals for the Fourth Circuit. The District Court, having found the state statutes valid, had dismissed the complaint upon the sole ground that it failed to state a claim, and did not reach the questions whether the complaint otherwise constituted a claim under the Civil Rights statutes. The Court of Appeals held, *Flemming v. S. C. Electric & Gas Co.*, 224 F. (2d) 752, that the South Carolina statutes requiring segregation of the races by common carriers were unconstitutional. Having thus decided the constitutional question it further held that the action of the defendant carrier was action "under color of state law," so as to entitle appellee to invoke the Civil Rights acts. It further decided that appellant's bus driver, although acting as a police officer under section 58-1498 of the South Carolina statutes in question, was acting for the appellant also in enforcing same so as to subject the appellant to liability under the Civil Rights Acts.

Appellant thereupon filed Notice of Appeal under the provisions of Title 28 U. S. C. section 1254 (2), challenging the three conclusions reached by the Court of Appeals.

The Court found the state statute inv
the Fourteenth Amendment, and all
being Federal questions within the me

## THE QUESTIONS ARE SUB

The gravity of the issues involve
evident. Thirteen states (Alabama,
Georgia, Louisiana, Maryland, Mississi
Oklahoma, South Carolina, Tennessee,
have constitutional or statutory provisi
gation of white and negro passengers i
tion. The public concern, both official a
problem of segregation has mounted
Court's decisions in *Brown v. Board of*
S. 483 and *Bolling v. Sharpe*, 347 U. S. 4
been reflected by formation of organize
one hand and various efforts to accomp
on the other. The uproar in the press a
platforms on both "sides" has not help
lem. Never have clear-cut decisions on th
been more needed. Prompt action shoul
Court to eliminate confusion.

On the one hand the Court of App
Circuit holds segregation (except in pub
valid under the "separate but equal"
*v. City of Atlanta*, 223 F. (2d) 93; *B*
193 F. (2d) 384. On the other hand the
for the Fourth Circuit holds: "We do
separate but equal doctrine of *Plessy v.*
longer be regarded as a correct staten
See *Dawson v. Mayor and City Cou*
*City*, 220 F. (2d) 386; and the decision h
*Flemming v. S. C. Electric & Gas Co.*, 22
one asserts that *Plessy v. Ferguson*, 16
the law of the land. The other asserts th



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"repudiated" it. Their decisions are hopelessly irreconcilable, and the volume of segregation actions in the Courts is mounting steadily. Only this Court can provide the answer. Public necessity requires that the question be determined, by the highest tribunal in the land.

The case in hand may be fairly said to reflect the "grass roots" nature of the problem. Appellee is only one of hundreds of thousands of persons who ride public conveyances daily in states where segregation has the sanction of law. The decision of the Court of Appeals of the Fourth Circuit has cast doubt in all their minds and the inconsistency in decisions in the Fourth and Fifth Circuits has resulted in even more uncertainty. Appellant's bus driver is only one of thousands who daily must enforce order in public conveyances without certainty as to which statute or decision is the correct one. Appellant is only one of hundreds of common carriers which must instruct its conductors and drivers in a fog of legal uncertainty, faced on both sides by statutory penalties if its guess is wrong.

Reference to *Brown v. Board of Education* cannot solve the problem, for there this Court appears to have rejected the principles of *Plessy v. Ferguson*, a transportation case, as they apply to public schools, but at the same time did not in terms overrule the "separate but equal" doctrine. The decision of the Court of Appeals does not solve the problem, even for the sole purpose of the case at hand, for it holds that segregation can no longer be upheld as a proper exercise of the state police power, 224 F. (2d) 752, 753. This Court held otherwise in *Korematsu v. U. S.*, 323 U. S. 214, and has refused to overrule *Plessy v. Ferguson* despite continuous urging by appellee's counsel and their associates for many years. In *Bolling v. Sharpe*, 347 U. S. 497, this Court stated only that classifications based solely upon race must be scrutinized with particular care, not that they were invalid *per se*.

It seems manifest to appellant that certainty in the law is most necessary in time of confusion and unrest, and that the importance of the questions presented by this appeal is obvious.

## II

There are two subsidiary questions: (1) Is the action of the appellant's driver, taken pursuant to statute, action by the carrier "under color of law" within the meaning of the Civil Rights Acts? (2) Are the acts of appellant's driver as a special policeman under state law imputable to the carrier so as to render it liable under the Civil Rights Acts?

Whether or not this Court holds the state statutes requiring segregation in public transportation to be valid, a decision on these questions concerning application of the Civil Rights Acts is necessary to this case and urgently needed in general. The mounting number of cases under the Acts foreshadow many more to come as the segregation conflict waxes. In those states where segregation is not required, as well as in the Southern states, the conductor or driver of a public conveyance is ordinarily a special policeman by statute. Is the carrier itself liable as having taken action "under color of law" although it has no power to prevent, or control the policeman while he performs his official duty?

The Court of Appeals for the Fourth Circuit seems to think so in the judgment here appealed from, 224 F. (2d) 752, 753. But it is in conflict with the Court of Appeals for the Third Circuit. In *Picking v. Pennsylvania R. Co.*, 151 F. (2d) 240, the latter Court held that the party to be held liable must have itself acted, or purported to act, on behalf of the state or as a state official, or conspired with persons so acting, before it can be held liable under the Civil Rights Acts. See also *Moore v. Atlantic Coast Line*, D. C. Pa., 98 F. Supp. 375.

The holding of the Court of Appeals for the Fourth Circuit would appear to establish for Civil Rights cases a rule that runs counter to the general common-law rule that the doctrine of *respondeat superior* has no application where the servant, who is also a special policeman by statute, is engaged in discharging his statutory duty. See ALI, Restatement of Agency, Sections 217 (a) and 245 (f); 39 Corpus Juris 1273; Labatt, Master and Servant, Vol. 6, P. 7535; 35 A. L. R. 681; *Redgate v. Southern Pacific*, 24 Cal. 573, 141 Pac. 1191; *Houston v. Minneapolis R. Co.*, 25 N. D. 469, 141 N. W. 995.

It is respectfully submitted that the Court of Appeals erred in its holdings on these two questions; that they are substantial and important in the nationwide application of the Civil Rights Acts; and that this appeal should be heard on these questions, even if the grave question of the overruling of *Plessy v. Ferguson* were not involved in the appeal. It is of importance to appellant and to every public carrier to have stated clearly the scope of its liability under the Civil Rights Acts, whether or not the statute the driver enforces is valid.

## III

Finally, there is the matter that, whether the Courts of Appeals agree or disagree, only this Court can overrule its own decisions. The Court below on another occasion, *Boyer v. Garrett*, C. A. 4, 183 F. (2d) 582 (1950), when asked to overrule *Plessy v. Ferguson*, said: "It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded." The Court below erred in this case when it departed from that rule. *Plessy v. Ferguson* has stood as a stabilizing influence for decades. None have recognized more clearly than this Court the unwisdom of precipitate action in trying to change the habits and customs of the mass of the people. Now, while a part of that change is being worked, more than ever is the stabilizing in-

fluence of *Plessy v. Ferguson* needed. In a sense all too real to appellant and the millions of people who live daily with the problem it is clear that the public necessity requires the continued exercise of the police power in this field for the present. Neither wisdom nor fairness dictate that appellant should daily defend damage suits, on a strained theory of legal liability, under a penal statute, while the nation struggles to solve the segregation problem. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 7, 1955.